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No. 00-496

IN THE

Supreme Court of the United States

Mesa Airlines, Inc. and WestAir Commuter Airlines, Inc.,

Petitioners,

v.

United Airlines, Inc. and SkyWest Airlines, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONER

The Respondents' Brief in Opposition, which addresses, in the main, the merits of the Seventh Circuit's decision, itself raises several interesting issues, each one of which represents an additional reason for this Court to grant Petitioners' writ of certiorari.

1. Respondents note that Northwest Airlines has recently filed a petition for certiorari also asking this Court to resolve the conflicts in the federal circuits respecting the interpretation and application of the ADA's preemption provision. *See Northwest Airlines, Inc. v. Duncan*, 208 F.3d 1112 (9th Cir. 2000), *petition for cert. filed* (U.S. Sept. 13, 2000)(No. 00-404). In that particular litigation, which involves a health/personal injury issue, Northwest is seeking to overturn a Ninth Circuit decision which, it believes, construed ADA preemption in too *narrow* a fashion. Is this not a strong indication that the scope of ADA preemption is an issue on which there is a great deal of controversy and dispute on both ends of the spectrum, and on which there exists a great and pressing need for guidance and direction from this Court?

2. Respondents assert that the claims at issue clearly "relate to" airline "rates, routes or services." This may be true with respect to the *subject matter* of the private contract in dispute; and not surprisingly, given that the contracting parties are themselves airlines. However, does this not lead to resolving the more difficult questions of whether Petitioners' attendant

business tort claims "relate to" routes in the manner contemplated by Congress in its deregulation of the airline industry, and whether such a linguistic analysis is even of assistance in ascertaining that Congressional intent?

3. Respondents make reference to the ADA's "savings clause," which Judge Easterbrook claimed "does not carve any domain from the scope of [ADA preemption]." App. 5a. However, if the savings clause has no impact on the contours or substance of ADA preemption, what intended purpose *does* it have?

4. Respondents refer to Judge Easterbrook's conclusion that Petitioners' tortious interference with contract claim would "suppress competition, which would undercut the Airline Deregulation Act of 1978." App. 14a. However, could Congress have intended that what has been historically and traditionally considered as "wrongful" competition be nevertheless protected, and even encouraged? And is not such a conclusion even more troublesome, when one considers that Petitioners are now left with no claim or private remedy whatsoever against Respondent SkyWest Airlines (the alleged wrongful competitor)?

5. Although Respondents echo Judge Easterbrook's assertion that Petitioners' breach of fiduciary duty claim necessarily implicates "rules external to the parties' bargain," App. 12a, does not this argument "assume[ ] the answer to the very contract construction issue on which [Petitioners'] claims turn," *American Airlines, Inc.*

v. Wolens, 513 U.S. 219, 234 (1995), *i.e.*, whether Petitioners and United in fact had contractually agreed to be bound by traditional partnership principles?

6. Although Respondents cite Judge Easterbrook's concern over the possible conflicting standards embodied in the common law of the 50 states, would not the same argument apply to *any* tort claim brought against an airline, regardless of whether it fell within the intended statutory scope of "rates, routes or services"? Would this not result in a total preemption of all state tort claims? *See Somes v. United Airlines, Inc.*, 33 F.Supp.2d 78, 84 (D. Mass. 1999). Moreover, are not airlines already subject to differing standards of conduct with respect to "generally applicable tax, environmental, or blue sky laws, which as a general matter are not preempted under the ADA"? *Abdu-Brisson v. Delta Air Lines, Inc.*, 128 F.3d 77, 84 (2nd Cir. 1997). And at any rate, is not the partnership law which forms the basis of Petitioners' breach of fiduciary duty claim, and which is embodied in the Uniform Partnership Act, similar to contract law, in that neither is "diverse, nonuniform, [or] confusing"? *Wolens*, 513 U.S. at 233 n. 8 (internal cite omitted).

The above issues, which are all subsumed in Petitioners' "Questions Presented For Review," are part and parcel of the enormous confusion and uncertainty concerning the intended contours and limits of the ADA's preemption provision, a conflict which is open and acknowledged in the federal circuits. As Justice

Ginsburg stated in *Wolens*, the pivotal issue is: "[W]here is it proper to draw the line . . . between what the ADA preempts, and what it leaves to private ordering, backed by judicial enforcement?" 513 U.S. at 234. In the case at bar, these preemption issues arise in the context of commercial business dealings between airlines—a setting far removed, and which we submit presents far more difficult preemption and policy issues, from those considered by the Court in *Morales*[1] and *Wolens*.

CONCLUSION

This case represents an altogether appropriate and timely opportunity for the Court to revisit the issue of ADA preemption, so as to clarify the proper avenue of analysis in light of the Court's recent ERISA jurisprudence, and to address the admittedly difficult application of those principles in the burgeoning world of inter-airline partnerships and collaborative ventures. Accordingly, Petitioners respectfully request that their writ of certiorari be granted.

Respectfully submitted,

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[1] *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).